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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 1062

K. ROLAND CLARK
PETITIONER,

v.

WILLIAM M. BIRD, JR.,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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Opinions Below

There was no formal opinion by the district court. Its decision was rendered from the bench after trial and has not been reported. The opinion of the Court of Appeals has not yet been reported, but is printed as Appendix A of this Petition Page 6.

Jurisdiction

The order of the court of appeals dismissing the appeal and affirming the judgment of the district court was entered

on 14 January 1966. The taxation of costs against the petitioner, upon consideration of the appellee's verified bill of costs, proposed taxation, and opposition thereto, was entered on 26 January 1966. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1) and Supreme Court rule 19(b), viz., the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings and so far sanctioned such a departure by the district court as to call for an exercise of this court's power of supervision.

Questions Presented

1. May a complainant be denied recovery of damages for alleged violation of his civil rights upon findings of fact predicated neither upon evidence or logical inferences, consistent with his immunity from the deprivation of liberty or property unless by the due process of law as guaranteed him by Article XIV, section 1, of the amendments to the United States constitution, and

2. May a prevailing party recover costs, taxed against the losing complainant, which said costs represent obligations for the printing of brief and record appendix for the appellee in the Court of Appeals incurred by a municipal corporation as a volunteer, there being on its part no primary or secondary liability either to the complainant or the defendant?

Constitution, Statute, and Rule Involved

Art. XIV, sec. 1, Amendm. U.S. Const.

"...(N)or shall any person be deprived of ... liberty or property unless by due process of law".

Revised Statutes, section 1979, 42 U.S.C. section 1983.

> "Every person, who under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Federal Rules of Civil Procedure #54(d)

> ". . . (C)osts shall be allowed as of course to the prevailing party unless the court otherwise directs; . . ."

Rules of Court of Appeals, First Circuit #31(2)

> "In all cases of affirmance by this court of any . . . judgment . . . costs shall be allowed to the appellee or respondent unless otherwise ordered by the court."

Statement of the Case

Pursuant to the pattern utilized in *Monroe* v. *Pape,* 365 US 167 5 L.ed.2 492, 81 S.Ct. 473, plaintiff K. Roland Clark brought suit against police officer William M. Bird alleging that Bird had deprived him of his federally protected civil rights by arresting and causing his imprisonment without warrant or probable cause therefor. The plaintiff further alleged that if Bird detained him for interrogation and investigation pursuant to the General Laws of Rhode Island, 1956, 12-7-1, the so-called uniform arrest act, said statute afforded Bird no justification because it was in violation of the 14th amendment to the United States constitution.

The facts were not contradicted. On the afternoon of

23 January 1962 about nine police officers of the city of Providence had assembled in front of the Roger Williams Park museum to have themselves photographed as a group constituting the "K-9 corps". At the photographer's direction they removed to another location which was deemed more suitable. As defendant Bird, in uniform, was getting into his well-marked police vehicle, an unidentified man, unknown to patrolman Bird, approached him and stated that he had observed someone wearing a T-shirt, dungarees and no hat abandon a car up the road. Tr. p. 44. Without either seeing or investigating the "abandoned" car Bird proceeded to search for the "culprit" and found the plaintiff Clark, who answered the given description standing and gazing at the edge of a frozen lake. Tr. p. 60. Bird called to him whereupon Clark came up the embankment toward the police vehicle, but he reached a point about 25 feet from it, he turned and ran away. Tr. p. 8. Bird and officer Cahill, his companion, gave chase in the police car and seized Clark about 100 yards away. Tr. p. 8. Although Clark orally protested, "This is a false arrest; I refuse to answer all question on the advice of counsel" Tr. p. 31, he obeyed Bird's order to get into the police vehicle. Tr. p. 31. Bird referred to it as a seizure and apprehension of Clark. Tr. p. 8. Bird then informed Clark that he was going to take him to the station for an investigation. Tr. p. 9. Clark was released within two hours without any charges being preferred against him.

The district court held that (1), Clark had invited the arrest by his conduct, (2), his arrest was perfectly justified pursuant to G.L. 1956, 12-7-1, and (3), the aforesaid statute was a valid exercise of the police power of the State of Rhode Island. Clark appealed therefrom to this court.

The Court of Appeals affirmed the District Court judgment upon ground (1) and did not pass upon the other grounds.

Basis of Federal Jurisdiction In District Court

As set forth in his complaint to the District Court wherein paragraph (2) thereof he set forth Article XIV, section 1, of the Amendments to the United States Constitution and Revised States, section 1979, 42 U.S.C., section 1983. Since consent was not pleaded as a defense by the defendant, there was no opportunity to raise a defense to such a finding until after the district court had rendered its decision.

Reasons For Allowance of the Writ

It was held in *Thompson* v. *Louisville,* 362 U.S. 199, 80 S.Ct. 624, 4 L.ed.2 654, that a finding against a defendant in a criminal case without any evidence against him was a denial of his immunity against deprivation of his liberty unless by due process of law. The petitioner contends that the same theory is applicable to a plaintiff seeking redress for wrongs committed against him. It is the petitioner's contention that there was no evidence or logical inference whereby it could be found that he consented to his arrest. Any connection between the plaintiff/petitioner and the unidentified informant was strictly imaginary. For all that appears, the informant could have acted out of malice toward the petitioner. In any event, the provisions of the civil rights act should not be permitted to be obviated by strained findings by trial courts.

As to the matter of costs, it is axiomatic that a volunteer may not recover judgment for expenditures incurred. This same principle should be applicable in the matter of taxation of costs. 20 CJS 352 n 59 15 CJ 96 n 53.

K. Roland Clark,
By his attorney,
Aram K. Berberian

Appendix A

United States Court of Appeals
For the First Circuit

No. 6635.

K. ROLAND CLARK,
PLAINTIFF, APPELLANT,

v.

WILLIAM M. BIRD, JR.,
DEFENDANT, APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

Before ALDRICH, *Chief Judge*,
COFFIN, *Circuit Judge*, and FORD, *District Judge*.

Aram K. Berberian for appellant.
Vincent A. Ragosta, Assistant City Solicitor for the City of Providence, with whom *William E. McCabe*, City Solicitor for the City of Providence, was on brief, for appellee.

OPINION OF THE COURT.
January 14, 1966.

ALDRICH, *Chief Judge*. Plaintiff-appellant sued the defendant, a Providence policeman, in the District Court for the District of Rhode Island under the Civil Rights Act, 42 U.S.C. § 1983, for false arrest under the Rhode Island detention statute. R.I. Gen. Laws 12-7-1. In this court the defendant asserts that he acted within the statute, that the statute is constitutional—which plaintiff contests—and that, at most, if defendant acted without the exact terms of the statute, he was merely negligent and plaintiff has no claim within the Act. We reach none of these

questions. The district court, in dismissing the action after trial without jury, found, *inter alia,* that the arrest was deliberately brought about, "staged," by the plaintiff. We affirm on that ground.

Briefly, the facts are these. In the early afternoon of January 23, 1962, a complement of Providence police officers was engaged in having publicity pictures taken in Roger Williams Park. An unidentified man approached the defendant officer, stating that a person unsuitably dressed for the very cold weather, blue levis, T-shirt and hatless, had abandoned an automobile in the park. Shortly afterwards the defendant saw the plaintiff, dressed precisely as described. The plaintiff was walking, but when he came close to the defendant he turned and ran. The defendant pursued him in a police car. When overtaken, the plaintiff stopped, but refused to give his name and address or answer any questions. He informed the defendant that his refusal was on advice of counsel. The defendant "frisked" him for weapons, and found a wallet, containing no identifying papers. The defendant thereupon had the plaintiff taken to the police station. There he was identified and subsequently released without being booked. No force was used at any time.

At the trial, the plaintiff testified that in January 1962 he was unemployed; that he had no automobile, and did not drive one; that he had removed identifying papers from his wallet because he had been arrested before and felt it was no business of the police; that he presently had eight suits pending against various Cranston and Providence police officers; and that he did not know the defendant. The defendant, in turn, testified that he did not know the plaintiff.

We note the conceded ignorance of plaintiff's identity because of its bearing on a possible question of plaintiff's being arrested as a campaign of police persecution. The

campaign seems quite the other way. From the stranger's inexplicable false story about the car to the plaintiff's singular conduct before and after his arrest, the inference that he had deliberately staged the arrest was amply warranted.

The plaintiff has no cause of action. He cannot complain that he was confined against his will, when it was his will that he be confined. Even if the defendant acted beyond the statute, or if the statute were unconstitutional, the plaintiff cannot recover. This is not a case where the plaintiff might colloquially be said to have "asked for it" simply because he engaged in conduct he could reasonably expect would incur police attention, but a case where his express purpose was to be arrested. *Volenti non fit injuria. Cf. Pierson* v. *Ray*, 5 Cir., 10/25/65; *Ellis* v. *Cleveland*, 1882, 54 Vt. 437.

In *Pierson* v. *Ray* the plaintiffs participated in certain conduct, expecting that the police might disapprove and that it would lead to their unlawful arrest. The court held that they had, in effect, consented to their arrest. On the facts, the court may very possibly have carried the principle too far, especially as there was a valid social purpose in plaintiffs' activities. In the case at bar, the court was warranted in finding not merely that the plaintiff had conducted himself as, legally, he was entitled to, but that through the unidentified informant, he took other, affirmative steps, not to exercise rights, but to mislead the police. As soon as the true situation was discovered he was discharged. Plaintiff's conduct was an imposition, both on the police and on the court.

Affirmed.